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The Congressional Investigating Power: Ramifications of the Watkins-Barenblatt Enigma

Michael C. Slotnick

THE CONGRESSIONAL INVESTIGATING POWER: RAMIFICATIONS OF THE WATKINS-BARENBLATT ENIGMA

MICHAEL C. SLOTNICK*

I. INTRODUCTION

One of the more controversial aspects of constitutional law in recent years involves the rights and privileges of the individual as he comes into contact with governmental action. In particular, the assertion of civil liberties by witnesses appearing before legislative investigating committees has provoked bitter debates. The congressional quest for internal security against the alleged menace of encroaching communism has been largely responsible for creating a delicate and difficult situation. Consequently, the United States Supreme Court has been confronted with the unenviable task of having to decide who merits greater protection — the Congress in its legislative endeavors to provide for the security of the entire nation or the witness in his attempt to assert individual liberties.

A witness facing a congressional committee may always rely upon the self-incrimination clause of the Fifth Amendment to the United States Constitution,[1] but this defense has decided disadvantages.[2] The

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1. Watkins v. United States, 354 U.S. 178, 195-96 (1957); Quinn v. United States, 349 U.S. 155, 161 (1955); United States v. Shelton, 148 F. Supp. 926, 933 (D.D.C. 1957); United States v. Emspak, 95 F. Supp. 1012, 1018 (D.D.C. 1951), *aff'd*, 203 F.2d 54 (D.C. Cir. 1952), *rev'd on other grounds*, 349 U.S. 190 (1955); United States v. Yukio Abe, 95 F. Supp. 991, 992 (D. Hawaii 1950). See also Sinclair v. United States, 279 U.S. 263, 289 (1929); *In re* Chapman, 166 U.S. 661, 666 (1897).

2. See PRITCHETT, THE POLITICAL OFFENDER AND THE WARREN COURT 42-45 (1958).

plea of self-incrimination undoubtedly carries a stigma, regardless of a Supreme Court determination that the plea in itself has no sinister connotation.[3] The label of a "Fifth Amendment Communist" is certainly undesirable. Moreover, when a question propounded to a witness using this defense appears to be innocuous, it may be incumbent upon the witness to give some indication why an answer to the question would be self-incriminatory.[4] Still another deterrent to the plea is that the privilege against self-incrimination may be waived by testimony given prior or subsequent to the claiming of the privilege.[5] The final obstacle is the Immunity Act of 1954, whereby a witness may be compelled to testify before a court, grand jury or congressional committee in a national security case and thus be denied the privilege against self-incrimination, provided that he be granted immunity from prosecution for any criminal activities he may reveal.[6]

Because of the above weaknesses in the self-incrimination plea, the witness is searching for alternative constitutional defenses which would prevent the committee of inquiry from compelling him to testify. In *Watkins v. United States*,[7] the Supreme Court opened what appeared to the "conservatives" to be a Pandora's box of possible defenses. However, in the recent case of *Barenblatt v. United States*,[8] a five-man majority of the Court succeeded in closing the lid of the box by a methodical destruction of almost every conceivable plea found in the *Watkins* decision.

In this article the writer will endeavor to describe briefly the background leading to the *Watkins* decision, to explore those defenses which were considered by the Court in *Watkins* and to re-examine these defenses in the light of the *Barenblatt* case.

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3. Slochower v. Board of Higher Educ. of New York City, 350 U.S. 551, 556-58 (1956). *But see* Emspak v. United States, 349 U.S. 190, 195 (1955).

4. "[T]raditionally the witness has not been allowed to be sole judge of the character of the questions objected to; he is required to open the door wide enough for the court to see that there is substance to his claim." Harlan, J., dissenting. Emspak v. United States, 349 U.S. 190, 207 (1955). See also United States v. Rosen, 174 F.2d 187 (D.C. Cir. 1949); United States v. Weisman, 111 F.2d 260 (2d Cir. 1940).

It should be noted that the Supreme Court in past internal security cases has held that the questions were not innocent in themselves, but called for answers which would tend to incriminate the witness. See Emspak v. United States, 349 U.S. 190 (1955); Quinn v. United States, 349 U.S. 155 (1955); Blau v. United States, 340 U.S. 159 (1950).

5. Rogers v. United States, 340 U.S. 367 (1951). See also Emspak v. United States, 349 U.S. 190 (1955); Smith v. United States, 337 U.S. 137 (1949).

6. Immunity Act of 1954, 18 U.S.C. § 3486 (1958). Although the Supreme Court has not as yet passed upon the portions of the Immunity Act relevant to congressional committees, it has upheld the constitutionality of the Act as it pertains to witnesses appearing before grand juries or courts. Ullmann v. United States, 350 U.S. 422 (1956).

7. 354 U.S. 178 (1957).

8. 360 U.S. 109 (1959).

II. The Background

A. *The Pre-Watkins Era*

1. THE INVESTIGATING POWER PRIOR TO WORLD WAR II

Until the post World War II years, litigation over legislative investigations occupied a rather insignificant portion of the Supreme Court's business. In the earlier years the Court was concerned merely with establishing the existence and extent of the congressional investigating power.

Although a statute enacted in 1798[9] made it fairly clear that Congress intended to make use of an investigating power, it was not until the 1821 case of *Anderson v. Dunn*[10] that the first weak traces of a judicial awareness of such a power can be found. Although the *Anderson* case did not involve a congressional investigation, the Court recognized that there existed in Congress a coercive power over non-members. This recognition is basic to the proposition that unless Congress has the use of compulsory process at its disposal, the value and effect of the investigating power would be greatly diminished.

Congress, in 1857, attempted to support the investigatory power with judicial sanctions. In that year Congress enacted a statute which provided:

> That any person summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter before either House, or any committee of either House of Congress, who shall wilfully make default, or who, appearing, shall refuse to answer any question pertinent to the matter of inquiry in consideration before the House or Committee by which he shall be examined, shall in addition to the pains and penalties now existing, be liable to indictment as and for a misdemeanor, in any court of the United States having jurisdiction thereof. . . .[11]

Several years after the enactment of the above statute, the Supreme Court in the case of *Kilbourn v. Thompson*[12] was confronted for the first

9. "SECTION 1. *Be it enacted* . . . , That the President of the Senate, the Speaker of the House of Representatives, a chairman of a committee of the whole, or a chairman of a select committee of either house, shall be empowered to administer oaths or affirmations to witnesses, in any case under their examination." 1 Stat. 554, ch. 36 (1798). Six years earlier the House of Representatives had appointed a select committee to inquire into the defeat of General St. Clair. 3 ANNALS OF CONG. 1106 (1791-93).

10. 19 U.S. (6 Wheat.) 204 (1821). The House of Representatives had adjudged Anderson, who was not a member of the House, "guilty of a breach of the privileges of the House and of a high contempt of the dignity and authority of the same." Although the offense committed was not mentioned by the Court, it appeared from argument of counsel that Anderson had attempted to bribe a congressman. *Id.* at 217.

11. 11 Stat. 155, ch. 19, § 1 (1857). The current counterpart of Section 1 of this act is found in 2 U.S.C. § 192 (1958). A criminal indictment is more serious than an exercise by Congress of its own contempt power, since punishment by Congress is limited to an imprisonment which may not be extended beyond the session of Congress in which the contempt occurred. Marshall v. Gordon, 243 U.S. 521, 542 (1917); Anderson v. Dunn, 19 U.S.(6 Wheat.) 204, 230 (1821).

12. 103 U.S. 168 (1881). This was an action for false imprisonment brought by a recalcitrant witness against the Sergeant-at-Arms of the House of Representatives. The House had relied upon its own contempt power rather than upon the Act of 1857.

time with litigation over a congressional investigation. A committee of the House of Representatives was authorized to investigate a real-estate pool and settlement which, at the time, was being considered by a federal district court in a bankruptcy proceeding. The Supreme Court held the subject matter of the investigation to be within the function of the judiciary and, therefore, beyond the purview of the legislative branch of the government. The Court gratuitously announced that neither House of Congress possessed a "general power of making inquiry into the private affairs of the citizen."[13] Since Congress had exceeded its power in authorizing the investigation, "the committee . . . had no lawful authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell. . . ."[14] Clearly, *Kilbourn v. Thompson*, standing alone, was not indicative of unlimited power in Congress to make investigations and compel testimony.[15]

In re Chapman,[16] decided in 1897, involved a Senate committee investigation into charges that Senators were yielding to corrupt influences in considering a tariff bill. Since the inquiry related to the integrity and fidelity of Senators in the discharge of their duties, the Court found the subject matter of the investigation to be uniquely within the jurisdiction of the Senate. Consequently, witnesses could be compelled to appear and testify. The high tribunal also sustained the constitutionality of the Act of 1857.

In *McGrain v. Daugherty*,[17] a 1927 decision, the Supreme Court considered the earlier cases and then proclaimed that "the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function."[18] With this statement, the Court broke away from the confinements of the *Kilbourn* decision and expanded the possible subject matter for congresisonal investigation well beyond that which was upheld in the *Chapman* case. Although the Court continued to maintain that Congress was not invested with general power to inquire into private affairs, the existence of the investigatory power could never again be open to doubt. In the *McGrain* case a Senate committee which was authorized to investigate charges of misfeasance and nonfeasance in the Department of Justice had served a subpoena on the Attorney

13. *Id.* at 190.
14. *Id.* at 196.
15. One writer noted two factors which may have accounted for the rather narrow decision. (1) With the exception of Mr. Justice Strong, who was in ill health at the time of the decision, none of the members of the Court had any major legislative experience. (2) The Court was not thoroughly enlightened by counsel, although there existed a large mass of legislative precedents in Parliament, in the Colonial and State Legislatures and in Congress. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 214-15 (1926).
16. 166 U.S. 661 (1897).
17. 273 U.S. 135 (1927).
18. *Id.* at 174.

General's brother commanding him to appear and testify. However, the witness failed to appear. The Court found that since the functions of the Justice Department were subject to congressional regulation and its activities depended upon congressional appropriations, "the subject was one on which legislation could be had and would be materially aided by information which the investigation was calculated to elicit."[19] As a result, the Court concluded that the investigation was ordered for a legitimate object and that the witness wrongfully refused to appear and give testimony pertinent to the inquiry.

Two years after the *McCrain* case the Supreme Court in *Sinclair v. United States*[20] upheld a Senate committee investigation into the leasing of naval oil reserves by the Secretary of the Navy and the Secretary of the Interior. The case is significant primarily for the Court's consideration of the defense of pertinency. Although the witness was unsuccessful in his contentions, the Court stressed the fact that the questions propounded to the witness must be pertinent to the subject matter under investigation. In the two decades following the *Sinclair* case, the Supreme Court added little to the development of the congressional investigating power.[21]

2. THE INVESTIGATING POWER DURING AND AFTER WORLD WAR II

After World War II, the Supreme Court reorientated its approach toward the congressional committee. The high tribunal was no longer concerned with proving the existence of the power of inquiry and the compulsory process to enforce it. Instead, the Court began to focus its attention on the rights and privileges of the individual who had to appear before the committees. The change of emphasis had a disrupting effect on the Court. Whereas all the previous decisions had been marked with accord and unanimity, the new series of cases were frequently accented by dissension among the several Justices.[22]

The post-war cases centered around a new type of investigation conducted by the House Un-American Activities Committee. The Committee

19. *Id.* at 177.
20. 279 U.S. 263 (1929).
21. Barry v. United States *ex rel.* Cunningham, 279 U.S. 597 (1929) (Court upheld a warrant of arrest directing a non-member of the Senate to appear and answer questions pertaining to alleged fraud and unlawful practices in connection with the nomination and election of a Senator); Jurney v. MacCracken, 294 U.S. 125 (1935) (Court upheld the power of the Senate to cite for contempt a witness charged with having permitted the removal and destruction of papers which he had been subpoenaed to produce); United States v. Norris, 300 U.S. 564 (1937) (Court upheld a conviction for perjurious statements made before a Senate committee investigating campaign expenditures in Senatorial elections).
22. Barenblatt v. United States, 360 U.S. 109 (1959) (5-4); Sacher v. United States, 356 U.S. 576 (1958) (6-2); Watkins v. United States, 354 U.S. 178 (1957) (6-1); Bart v. United States, 349 U.S. 219 (1955) (6-3); Emspak v. United States, 349 U.S. 190 (1955) (6-3); Quinn v. United States, 349 U.S. 155 (1955) (8-1); United States v. Fleischman, 339 U. S. 349 (1950) (5-2); United States v. Bryan, 339 U.S. 323 (1950) (5-2); Eisler v. United States, 338 U.S. 189 (1949) (5-4); Christoffel v. United States, 338 U.S. 84 (1949) (5-4); United States v. Josephson, 333 U.S. 838 (1948), *denying cert.* 165 F.2d 82 (2d Cir. 1947) (5-4).

had first been established by the House of Representatives in 1938.[23] After functioning as a special committee, it was raised to the level of a standing committee in 1945.[24] The Committee throughout the years became more interested in exposing subversion, or alleged subversion, than in gathering facts for legislative action. One writer has noted that in the first ten years of its existence the only legislation proposed by the Committee and enacted by Congress was a rider to an appropriation bill which would serve to terminate the salaries of three governmental employees.[25] The Supreme Court later invalidated the rider as a bill of attainder.[26] In 1952, Professor Robert K. Carr made the following comment:

> No Congressional investigating committee in history has provoked more controversy or criticism than has the Un-American Activities Committee of the House of Representatives. No such committee has been more bitterly attacked or more vigorously defended. To some Americans it has constituted one of the gravest threats to civil liberty our nation has ever known; in less than a decade it has managed to create and impose a loyalty standard upon the nation that has dangerously narrowed our traditional freedoms of thought, expression, and association. To other Americans the committee has been our chief bulwark against subversion; almost singlehandly it has saved the nation against enslavement by the Communists.[27]

The first significant cases concerning the Un-American Activities Committee were decided on the federal court of appeals level in the late 1940's. The Second Circuit in *United States v. Josephson*[28] and the District of Columbia Circuit in *Barsky v. United States*[29] and in *Lawson v. United States*[30] upheld the authority of the Committee as against various constitutional and legal arguments.

Until 1955, the United States Supreme Court refused to write any significant opinion concerning the constitutionality of Congress's new use of its investigating power. The Court denied certiorari in *Josephson*,[31]

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23. H. Res. 282, 75th Cong., 3d Sess., 83 CONG. REC. 7568, 7586 (1938).
24. H. Res. 5, 79th Cong., 1st Sess., 91 CONG. REC. 10, 15 (1945).
25. Urgent Deficiency Appropriation Act of 1943, § 304, 57 Stat. 450 (1943). See EMERSON & HABER, POLITICAL & CIVIL RIGHTS IN THE UNITED STATES 432 (1st ed. 1952). See also Josephson v. United States, 165 F.2d 82, 96 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948). *But see* House Comm. on Un-American Activities, *Investigation of Un-American Activities and Propaganda*, H. R. REP. No. 2742, 79th Cong., 2d Sess. 17-18 (1947). In 1948 the Un-American Activities Committee was responsible for reporting out the Mundt-Nixon Bill, which formed the basis for the Internal Security Act of 1950, 64 Stat. 987 (1950), 50 U.S.C. §§ 781-826 (1952).
26. United States v. Lovett, 328 U.S. 303 (1946).
27. CARR, THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 1 (1952).
28. 165 F.2d 82 (2d Cir. 1947), *cert denied*, 333 U.S. 838 (1948).
29. 167 F.2d 241 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948). *Accord*, Dennis v. United States, 171 F.2d 986 (D.C. Cir. 1948), *aff'd*, 339 U.S. 162 (1950).
30. 176 F.2d 49 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 934 (1950).
31. 333 U.S. 838 (1948).

Barsky,[32] and *Lawson*.[33] In the 1953 case of *United States v. Rumely*,[34] involving the authority of the House Select Committee on Lobbying Activities, the witness argued the First Amendment. However, the Court by narrowly construing the authorizing resolution of the Committee, avoided having to decide the constitutional issue. In another case the Court would not discuss the merits of the investigation because the witness had fled the country.[35] In five other congressional investigation cases decided in this period, the Court limited its consideration to technical and evidentiary matters.[36]

In 1955, the Supreme Court for the first time dealt with the constitutional arguments of witnesses appearing before the Un-American Activities Committee. In three decisions based upon the Fifth Amendment's privilege against self-incrimination, the Court reviewed and reversed contempt convictions.[37] These decisions were indicative of the liberal approach the Supreme Court was to take two years later in the *Watkins* case.

B. *The Watkins Case*

1. THE FACTS

On April 29, 1954, John T. Watkins appeared as a witness before a Subcommittee of the Un-American Activities Committee, which at the time was allegedly investigating labor union activities. After other witnesses had testified to Watkins' connection with the Communist Party, he fully disclosed his past political associations and activities. Watkins further offered to answer any questions concerning persons whom he knew to be members of the Communist Party and whom he believed to be continuing their membership. He refused, however, to answer any questions with respect to others with whom he had associated. Watkins expressly did not plead the privilege against self-incrimination, but rather challenged the pertinency of the questions to the work of the Committee and the right of the Committee to undertake the public exposure of persons because of their past activities.

Criminal proceedings were initiated against Watkins for his refusal to answer questions. He was subsequently found guilty of contempt of Con-

32. 334 U.S. 843 (1948).
33. 339 U.S. 934 (1950).
34. 345 U.S. 41 (1953).
35. Eisler v. United States, 338 U.S. 189 (1949).
36. United States v. Fleischman, 339 U.S. 349 (1950) (Sufficiency of evidence to sustain a conviction of a witness who failed to produce papers); United States v. Bryan, 339 U.S. 323 (1950) (Necessity for the presence of a quorum of the Committee at the time the witness failed to produce records); Morford v. United States, 339 U.S. 258 (1950) (Defect in the *voir dire* examination of the jury in a contempt of Congress conviction); Dennis v. United States, 339 U.S. 162 (1950) (Defect in the *voir dire* examination of the jury in a contempt of Congress conviction); Christoffel v. United States, 338 U.S. 84 (1949) (Necessity for the presence of a quorum of the Committee at the time of the alleged perjurious testimony).
37. Bart v. United States, 349 U.S. 219 (1955); Emspak v. United States, 349 U.S. 190 (1955); Quinn v. United States, 349 U.S. 155 (1955).

gress. A three-judge panel of the court of appeals, one judge dissenting, reversed the conviction, but upon rehearing *en banc*, two judges dissenting, the court affirmed the conviction.[38] Upon a writ of certiorari, the Supreme Court reversed the judgment of the court of appeals and remanded the case to the district court with instructions to dismiss the indictment.[39] Mr. Chief Justice Warren wrote the majority opinion, Mr. Justice Frankfurter concurred specially and Mr. Justice Clark dissented. Justices Burton and Whittaker did not take part in the decision.

2. THE INVESTIGATING POWER AND ITS GENERAL LIMITATIONS

After stating the facts in the case, the Chief Justice examined the scope of the power of inquiry:

> The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.[40]

Having made these concessions, Mr. Chief Justice Warren in summary fashion considered the limitations on the investigating power:

> No inquiry is an end in itself; it must be related to and in furtherance of a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible. . . . The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged.[41]

3. THE FIRST AMENDMENT, VAGUENESS AND PERTINENCY

The major portion of the Chief Justice's opinion dealt with the three specific defenses of the First Amendment, vagueness and pertinency. Briefly, the arguments of the majority were as follows:

An investigation is clearly subject to the commands of the First Amendment. Although the First Amendment does not bar all congressional inquiries, the Court must find that the investigation is justified by a public need. Otherwise there is danger of encroaching upon the individual's

38. Watkins v. United States, 233 F.2d 681 (D.C. Cir. 1956).
39. Watkins v. United States, 354 U.S. 178 (1957). For an excellent casenote on the *Watkins* case, see 106 U. PA. L. REV. 124 (1957).
40. Watkins v. United States, 354 U.S. 178, 187 (1957).
41. *Id.* at 187-88.

right to privacy or abridging his liberty of speech, press, religion or assembly. "[T]here is no congressional power to expose for the sake of exposure."[42]

As Congress must bear the responsibility of insuring that compulsory process is used only in furtherance of a legislative purpose, it is incumbent upon Congress to explicitly designate the jurisdiction and purpose of the investigating committee. The authorizing resolution of the Un-American Activities Committee[43] apparently did not meet the Chief Justice's standard of clarity.[44]

Under the applicable statute,[45] a witness can be subject to criminal penalties only if he refuses to answer a question *pertinent* to the "question under inquiry." Hence, the witness cannot be compelled to respond to questions outside the scope of the subject under inquiry. In determining the pertinency of the questions, the witness is entitled to some guidance, be it the authorizing resolution, remarks of the chairman or members of the committee, or the obvious nature of the proceedings.

4. THE HOLDING

Despite the merit and eloquence of Mr. Chief Justice Warren's contentions, the actual holding in the case is probably somewhat limited as evidenced by the following two paragraphs:

> Unless the subject has been made to appear with undisputable clarity, it is the duty of the investigating body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it.
>
> The statement of the Committee Chairman [that the Subcommittee was investigating "subversion and subversive propaganda"], in response to petitioner's protest, was woefully inadequate to convey sufficient information as to the pertinency of the questions to the subject under inquiry. Petitioner was thus not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction is necessarily invalid under the Due Process clause of the Fifth Amendment. (Footnote omitted.)[46]

42. *Id.* at 200.
43. See note 80 *infra* and accompanying text.
44. See note 84 *infra* and accompanying text.
45. 2 U.S.C. § 192 (1958).
46. Watkins v. United States, 354 U.S. 178, 214-15 (1957). In connection with the holding of the case Professor Pritchett notes: "There has been a widespread tendency to read into Chief Justice Warren's decision in the *Watkins* case more than is probably there. It is only by contrast with the Court's previous submissions that the Watkins ruling seems startling bold." PRITCHETT, THE POLITICAL OFFENDER AND THE WARREN COURT 36 (1958).

5. THE CONCURRENCE AND THE DISSENT

Mr. Justice Frankfurter, in his concurring opinion, based the decision solely upon the fact that when Watkins refused to answer, he was not made aware of the pertinency of the information he might have given.

Mr. Justice Clark, in his dissent, was concerned over the majority's curbing of the informing function of Congress. The Justice discounted the First Amendment arguments by noting that there is no general privilege of silence. He found the authorizing resolution to be sufficiently clear, since the Court is "bound to presume that the action of the legislative body in granting authority to the Committee was with a legitimate object if [the action] is *capable* of being so construed."[47] Mr. Justice Clark believed that the Committee was also able to satisfy the requisite of pertinency. As Congress may inquire into the subject of communist activity, it may through its committees seek to identify individual members of the Communist Party. "The pertinency of the questions is highlighted by the need for the Congress to know the extent of communism in labor unions."[48]

III. THE CURRENT PICTURE

A. *Introduction to Barenblatt*

The investigating power of Congress was again examined by the Supreme Court in the 1959 case of *Barenblatt v. United States*.[49] This decision, which was favorable to the Un-American Activities Committee, represents the current delineation of the rights of the individual vis-à-vis the committee of inquiry.

On June 28, 1954, Barenblatt, a former teaching fellow at the University of Michigan and an instructor in psychology at Vassar College, appeared as a witness before a Subcommittee of the Un-American Committee. The Subcommittee, at the time, was investigating alleged communist infiltration into the field of education. Barenblatt refused to answer whether he was a member of the Communist Party, whether he had ever been a member of the Party or whether he had ever been a member of the Haldane Club of the Communist Party while attending the University of Michigan.[50] The witness in his refusal expressly disclaimed reliance upon the Fifth Amendment which was interpreted to mean the privilege against self-incrimination. Instead, he objected generally to the right of the Sub-

47. Watkins v. United States, 354 U.S. 178, 228 (1957).
48. *Id.* at 230.
49. 360 U.S. 109 (1959).
50. The witness's refusal to answer the three questions constituted three of the five counts brought against him. The other two counts, involved the witness's refusal to testify as to whether he knew one Francis Crowley as a member of the Communist Party or whether he (Barenblatt) was a member of the Haldane Club while a student at the University of Michigan Council of Arts, Sciences and Professions. The Supreme Court expressly excluded these latter questions from consideration.

committee to inquire into his political and religious beliefs or any other personal or private affairs or associational activities.[51]

Criminal proceedings, subsequently brought against Barenblatt, resulted in a conviction for contempt of Congress. The Court of Appeals for the District of Columbia affirmed the conviction.[52] The case first reached the Supreme Court in 1957, the year of the *Watkins* decision. Consequently, the Supreme Court vacated the judgment of the court of appeals and remanded the case to that court for further consideration in the light of *Watkins*.[53] The court of appeals reaffirmed the conviction.[54] In a 5-4 decision the Supreme Court upheld the court of appeals.[55] On the Supreme Court level, Mr. Justice Harlan wrote the majority opinion, joined by Justices Frankfurter, Clark, Whittaker and Stewart. Mr. Justice Black dissented. He was joined by Mr. Chief Justice Warren and Justices Douglas and Brennan.

Mr. Justice Harlan's opinion was almost a duplicate of the form and style prescribed by Mr. Chief Justice Warren in *Watkins v. United States*. The difference was that Mr. Justice Harlan arrived at conclusions antithetical to those of the Chief Justice. Similar to the reasoning of the Chief Justice, Mr. Justice Harlan began by briefly discussing the broadness of the congressional power of inquiry. He, likewise, recognized that the power had limitations, which appeared to be twofold: 1) Congress may not inquire into matters which are the exclusive concern of either the Judiciary or the Executive; and 2) "Congress . . . must exercise its powers subject to the limitations placed by the Constitution on governmental action, more particularly . . . the relevant limitations of the Bill of Rights."[56] The Justice then discussed the three major defenses considered in *Watkins*.

B. *The Vice of Vagueness*

The first issue discussed in *Barenblatt* was whether the compelling of testimony by the Subcommittee was either legislatively authorized or constitutionally permissible in view of the alleged vagueness of Rule XI,

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51. The grounds for Barenblatt's objection were set forth in a previously prepared memorandum which he was allowed to file with the Subcommittee. The United States Court of Appeals for the District of Columbia in deciding the *Barenblatt* case made the following comment on the memorandum:

> The statement can best be described as a lengthy legal brief attacking the jurisdiction of the committee to ask appellant any questions or to conduct any inquiry at all, based on the First, Ninth and Tenth Amendments, the prohibition against bills of attainder, and the doctrine of separation of powers. This brief cited more than twenty Supreme Court decisions, some of which do not concern the congressional power of investigation; and, in several instances, dissenting opinions were cited. Barenblatt v. United States, 240 F.2d 875, 879 n. 4 (D.C. Cir. 1957).

52. Barenblatt v. United States, 240 F.2d 875(D.C. Cir. 1957).
53. Barenblatt v. United States, 354 U.S. 930 (1957).
54. Barenblatt v. United States, 252 F.2d 129 (D.C. Cir. 1958).
55. Barenblatt v. United States, 360 U.S. 109 (1959).
56. *Id.* at 112.

§ 17(b),[57] the authorizing resolution of the Un-American Activities Committee.

A valid law must meet a standard of certainty, sufficient to make the law capable of comprehension,[58] especially where the statute attempts to define a crime.[59] When a federal law fails to attain this standard, the statute is void as a denial of due process of law as guaranteed by the Fifth Amendment.[60] These principles appear to be applicable to the authorizing resolutions of congressional committees,[61] since a refusal to testify may subject the witness to criminal penalties.[62]

The defense of vagueness, in part, stems from a traditional limitation placed upon the congressional investigation by the Supreme Court in *Kilbourn v. Thompson*.[63] In that case the Court demanded, in effect, that a congressional investigation be supported by a legislative purpose and that the authorizing resolution specify that purpose.[64] *Kilbourn* condemned

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57. H. Res. 5, 83d Cong., 1st Sess., 99 CONG. REC. 15, 18, 24 (1953).

58. *E.g.*, Weeds, Inc. v. United States, 255 U.S. 109 (1921); United States v. Cohen Grocery Co., 255 U.S. 81 (1921). See 50 AM. JUR. *Statutes* § 472 (1944); 82 C.J.S. *Statutes* § 68 (1953).

59. See United States v. Harriss, 347 U.S. 612 (1954); United States v. Cardiff, 344 U.S. 174 (1952); Boyce Motor Lines, Inc. v. United States, 342 U.S. 347 (1952); Jordan v. DeGeorge, 341 U.S. 223 (1951); American Communications Ass'n, C.I.O. v. Douds, 339 U.S. 382 (1950); Screws v. United States, 325 U.S. 91 (1945). See also Annot., 97 L. Ed. 203 (1953); Annot., 96 L. Ed. 347 (1952); Annot., 83 L. Ed. 893 (1939).

60. See A. B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233, 238 (1925), interpreting Weeds, Inc. v. United States, 255 U.S. 109 (1921); United States v. Cohen Grocery Co., 255 U.S. 81 (1921). See also Jordan v. DeGeorge, 341 U.S. 223 (1951); United States v. Petrillo, 332 U.S. 1 (1947). The *Weeds* and *Cohen* cases also indicated that vagueness contravened the Sixth Amendment. A state law failing to attain the requisite standard of certainty contravenes the due process clause of the Fourteenth Amendment. *E.g.*, Winters v. New York, 333 U.S. 507 (1948); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Herndon v. Lowry, 301 U.S. 242 (1937); Connally v. General Constr. Co., 269 U.S. 385 (1926).

61. This is inferred from the several congressional investigation cases in which the issue of vagueness was discussed by the courts. *E.g.*, Barenblatt v. United States, 360 U.S. 109 (1959); Watkins v. United States, 354 U.S. 178 (1957); Barsky v. United States, 167 F.2d 241 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948); United States v. Peck, 154 F. Supp. 603 (D.D.C. 1957). See also Note, *Constitutional Limitations on the Un-American Activities Committee*, 47 COLUM. L. REV. 417, 429 (1947). However, in *Barsky*, the court claimed that "there is a difference between the particularity required in the specification of a criminal act and that required in the authorization of an investigation . . . ." Barsky v. Unted States, 167 F.2d 241, 248 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948). In the *Peck* case the court appeared to decide the question of vagueness under the First Amendment. Mr. Justice Black, dissenting in *Barenblatt*, indicates that the degree of certainty is higher where First Amendment freedoms are involved. The implications of the First Amendment will be discussed on pp. 402-409 *infra*.

62. 2 U.S.C. § 192 (1958) makes refusal to testify before a congressional committee a misdemeanor under certain circumstances. See note 11 *supra* and accompanying text.

63. 103 U.S. 168 (1881).

64. "What was this committee charged to do? To inquire into the nature and history of the real-estate pool. How indefinite! . . . . We are of the opinion . . . that the resolution of the House of Representatives authorizing the investigation was in excess of the power conferred in that body by the Constitution; . . . ." *Id.* at 195, 196.

the idea of a congressional inquiry interfering with a judicial function.[65] After the *Kilbourn* decision, in congressional investigation cases not involving subversive activities, the federal courts have found the legislative purpose to exist in such areas as: integrity and purity of Senators,[66] misfeasance and nonfeasance of executive departments,[67] nomination and election of Senators,[68] violation of rights of free speech and assembly and undue influence with the right of labor to organize and bargain sollectively,[69] old-age pension plans,[70] sale and disposition of property acquired by the United States government in connection with the national defense and the war effort,[71] organized crime,[72] operations of the Reconstruction Finance Corporation, [73] and improper practices of organized labor.[74]

In re Chapman[75] broadened the requisite content of the authorizing resolution by declaring that "it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded."[76] *McGrain v. Daugherty*[77] upheld an authorizing resolution which revealed a subject on which legislation might be had, although it did not expressly avow that the investigation was in aid of legislation. The current position of the federal courts is that, irrespective of the motives of individual members of the committee, "when the general subject of investigation is one concerning which Congress can

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65. "[W]e are of the opinion that the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature clearly judicial." *Id.* at 192. See also United States v. Icardi, 140 F. Supp. 383, 388 (D.D.C. 1956).

66. *In re* Chapman, 166 U.S. 661 (1897).

67. Sinclair v. United States, 279 U.S. 263 (1929); McGrain v. Daugherty, 273 U.S. 135 (1927). See also United States v. Icardi, 140 F. Supp. 383 (D.D.C. 1956).

68. United States v. Norris, 300 U.S. 564 (1937); Barry v. United States *ex rel* Cunningham, 279 U.S. 597 (1929); Reed v. County Comm'rs, 277 U.S. 376 (1928). See also Seymour v. United States, 77 F.2d 577 (8th Cir. 1935). Technically this is an area where the Constitution explicity places judicial power in Congress. See U.S. CONST. art. 1, § 5, cl. 1.

69. United States v. Creech, 21 F. Supp. 439 (D.D.C. 1937).

70. Townsend v. United States, 95 F.2d 352 (D.C. Cir.), *cert. denied*, 303 U.S. 664 (1938).

71. United States v. Fields, 6 F.R.D. 203 (D.D.C. 1946), *aff'd*, 164 F.2d 97 (D.C. Cir. 1947), *cert. denied*, 332 U.S. 851 (1948). See also United States v. Fallbrook Pub. Util. Dist., 101 F. Supp. 298 (S.D. Cal. 1951).

72. United States v. DiCarlo, 102 F. Supp. 597 (N.D. Ohio 1952). See also United States v. Orman, 207 F.2d 148 (3d Cir. 1953); Bowers v. United States, 202 F.2d 447 (D.C. Cir. 1953); Marcello v. United States, 196 F.2d 437 (5th Cir. 1952).

73. Young v. United States, 212 F.2d 236 (D.C. Cir.), *cert. denied*, 347 U.S. 1015 (1954).

74. United States v. Cross, 170 F. Supp. 303 (D.D.C. 1959). See also Brewster v. United States, 255 F.2d 899 (D.C. Cir.), *cert. denied*, 358 U.S. 842 (1958).

75. 166 U.S. 661 (1897).

76. *Id.* at 670. A congressional committee's "power to conduct a hearing for legislative purposes is not measured by recommendations for legislation or their absence." Townsend v. United States, 95 F.2d 352, 355 (D.C. Cir.), *cert. denied*, 303 U.S. 664 (1938). *Accord*, United States v. Shelton, 148 F. Supp. 926, 934 (D.D.C. 1957).

77. 273 U.S. 135 (1927).

legislate, and when the information sought might aid in congressional consideration, a legitimate legislative purpose must be presumed."[78]

Although the cases recognize the authority of Congress to investigate subversive activities,[79] Rule XI, § 17(b) and its predecessors have been under continual attack.[80] Rule XI, § 17(b) reads:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.[81]

In *Barsky v. United States*,[82] a relatively early case on the Un-American Activities Committee, the Court of Appeals for the District of Columbia held that "Congress has power to make an inquiry of an individual which may elicit the answer that the witness is a believer in Communism or a member of the Communist Party [and the predecessor of Rule XI, § 17(b)] is sufficiently clear, definite and authoritative to permit this particular committee to make that particular inquiry."[83] In an elaboration on the validity of the authorizing resolution, Judge Prettyman, speaking for the majority, reasoned:

> It is said that the Resolution is too vague to be valid. Perhaps the one phrase "un-American propaganda activities" taken alone as it appears in subclause (i) of the Resolution, would be subject to that condemnation. But the clause, above-quoted, "subversive and un-American propaganda that . . . attacks the principle of the form of government as guaranteed by our Constitution," which is subclause (ii), is definite enough. It conveys a clear meaning,

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78. United States v. Orman, 207 F.2d 148, 157 (3d Cir. 1953); Morford v. United States, 176 F.2d 54, 58 (D.C. Cir. 1949), *rev'd on other grounds*, 339 U.S. 258 (1950); United States v. Cross, 170 F. Supp. 303, 306 (D.D.C. 1959).

79. United States v. Lattimore, 215 F.2d 847, 851 (D.C. Cir. 1954); Barsky v. United States, 167 F.2d 241, 246 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948); United States v. Josephson, 165 F.2d 82, 90 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948); United States v. Shelton, 148 F. Supp. 926, 934 (D.D.C. 1957); United States v. Knowles, 148 F. Supp. 832, 836 (D.D.C. 1957); United States v. Deutch, 147 F. Supp. 89, 91 (D.D.C. 1956). Although all the above cases preceded *Watkins*, the authority of Congress to investigate subversive activities appears never to have been questioned by the Supreme Court.

80. Barnblatt v. United States, 360 U.S. 109, 136-140 (1959) (dissent); Watkins v. United States, 354 U.S. 178, 201-06 (1957); Barsky v. United States, 167 F.2d 241, 260-63 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948) (dissent); Josephson v. United States, 165 F.2d 82, 95-97 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948) (dissent).

81. H. Res. 5, 83d Cong., 1st Sess., 99 CONG. REC. 15, 18, 24 (1953).

82. 167 F.2d 241 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948).

83. *Id.* at 250. In Lawson v. United States, 176 F.2d 49, 51-52 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 934 (1950), the first part of the above quote was upheld as against a claim that it was *obiter dicta*.

> and that is all that is required. The principles which underlie the form of the existing government in this country are well-enough defined in basic documents preceding the Constitution, are obvious in the undebated unanimity which prevailed on many basic propositions in the Convention of 1787, were stated during the consideration of the adoption of the Constitution, are stated in countless scholarly works upon principles of government, and, indeed, are taught even to high school students in our schools. . . . (Footnotes omitted.)[84]

It is interesting to compare the language of Mr. Chief Justice Warren in *Watkins v. United States*, decided nine years after *Barsky*:

> It would be difficult to imagine a less explicit authorizing resolution. Who can define the meaning of "un-American"? What is that single, solitary "principle of the form of government as guaranteed by our Constitution"? (Footnote omitted).[85]

The impact of the Chief Justice's attack affected at least one lower federal court. The District Court for the District of Columbia in the case of *United States v. Peck*[86] was confronted with the authorizing resolution of the Internal Security Subcommittee,[87] which is the Senate counterpart to the Un-American Activities Committee. The court compared the Senate resolution to Rule XI, § 17(b) and found the Senate resolution to be equally vague and indefinite. An earlier case of the Court of Appeals for the District of Columbia, which had held the resolution to be valid,[88] was distinguished by the fact that the case was decided prior to *Watkins*. Although the *Peck* case did not reach a higher tribunal, the Court of Appeals for the District of Columbia in *Sacher v. United States*,[89] decided seven and a half months after *Peck*, held the authorizing resolution of the Internal Security Committee to be clear and definite. Since the

84. Barsky v. United States, 167 F.2d 241, 247-48 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948). Followed in Marshall v. United States, 176 F.2d 473, 474 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 933 (1950).

85. Watkins v. United States, 354 U.S. 178, 202 (1957).

86. 154 F. Supp. 603 (D.D.C. 1957).

87. "*Resolved*, that the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the Internal Security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence." S. Res. 366, § 1, 81st Cong., 2d Sess., 96 CONG. REC. 16872 (1950). The court was concerned primarily with subsection (3).

88. United States v. Lattimore, 215 F.2d 847 (D.C. Cir. 1954). The issue as to vagueness, *per se*, was not actually considered in the *Lattimore case*. See also United States v. Shelton, 148 F. Supp. 926, 934 (D.D.C. 1957).

89. 252 F.2d 828 (D.C. Cir.), *rev'd on other grounds*, 356 U.S. 576 (1958). It is interesting to note that the court referred only to subsections (1) and (2) of S. Res. 366, § 1, *supra* note 87. Sacher v. United States, 252 F.2d 828, 831-32 (D.C. Cir.), *rev'd on other grounds*, 356 U.S. 576 (1958).

Supreme Court thereafter reversed *Sacher* on other grounds,[90] the constitutional status of the Internal Security Subcommittee after the *Watkins* decision was as nebulous as that of the Un-American Activities Committee.

Doubt as to the clarity of the authorizing resolution of the Un-American Activities Committee, and presumably that of the Internal Security Subcommittee, terminated with the rendering of the *Barenblatt* decision. The Supreme Court in *Barenblatt* expressly held that Rule XI, § 17(b) was not constitutionally infirm on the score of vagueness.

Mr. Justice Harlan first considered the vagueness issue within the context of *Watkins*. He readily disposed of this contention by declaring that the Supreme Court had reversed the Watkins conviction solely on the ground that the witness had not been adequately apprised of the subject matter of the investigation or the pertinency thereto of the questions that the witness had refused to answer. Examining Rule XI, § 17(b) independently of *Watkins*, the Justice believed that although § 17(b) when read in isolation might be vague, a "persuasive gloss of legislative history" showed "that in pursuance of its legislative concerns in the domain of 'national security' the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country."[91] Apparently, the "vice of vagueness" was purged by the actions of the House of Representatives which continued the life of the Committee year after year with no diminution in the Committee's powers.

Petitioner's final contention under the defense of vagueness was that Rule XI, § 17(b) should be construed to exclude the field of education from the Committee's compulsory authority. Mr. Justice Harlan again utilized the legislative gloss doctrine and found that, inasmuch as the Committee had been investigating without restraint the field of education since 1938, legislative approval was evident.

The dissenters, led by Mr. Justice Black, quoted with approval the words of Mr. Chief Justice Warren in *Watkins v. United States*. Mr. Justice Black believed that the Court in prior cases had "emphasized that the 'vice of vagueness' is especially pernicious where legislative power over an area involving speech, press, petition and assembly is involved."[92] Since the majority demanded that the witness balance his rights with the requirements of the state,[93] the Justice believed that the witness was entitled to know with sufficient certainty the compelling need for his responses. To the dissenters, this need was expressed neither in Rule XI,

90. Sacher v. United States, 356 U.S. 576 (1958).
91. Barenblatt v. United States, 360 U.S. 109, 118 (1959).
92. *Id.* at 137. To support his statement Mr. Justice Black cited: Scull v. Virginia, 359 U.S. 344 (1959); Watkins v. United States, 354 U.S. 178 (1957); Winters v. New York, 333 U.S. 507 (1948); Herndon v. Lowry, 301 U.S. 242 (1937). The *Scull*, *Winters* and *Herndon* cases were decided under the Fourteenth Amendment and did not involve congressional action.
93. The balancing of the interests test will be discussed on pp. 407-408 *infra*.

§ 17(b) nor in the House's several acquiescences in the Committee's assertions of power.

> If Congress wants ideas investigated, if it even wants them investigated in the field of education, it must be prepared to say so expressly and unequivocally. And it is not enough that a court through exhaustive research can establish, even conclusively, that Congress wished to allow the investigation. I can find no such unequivocal statement here. . . . I would hold that [Rule XI, § 17(b)] is too broad to be meaningful and cannot support petitioner's conviction.[94]

C. *Pertinency to the Subject Under Inquiry*

The second issue considered in *Barenblatt* was whether the witness was adequately apprised of the pertinency of the Subcommittee's questions to the subject under inquiry.

Although the *Watkins* case appears to hold that the due process clause of the Fifth Amendment protects a witness from the necessity of answering questions beyond the scope of the inquiry,[95] the cases generally are more concerned with the application of the statute which provides for indictment for a misdemeanor upon a witness's refusal to testify before a congressional committee.[96] This act specifies that criminal penalties attach only where the question is "pertinent" to the subject under inquiry. Technically there are two facets to this statutory requisite: 1) What is the subject matter of the investigation; and 2) How do the questions relate to the subject matter? The former question could have been treated under the topic of vagueness, i.e. does the authorizing resolution sufficiently show the subject matter of the investigation? However, inasmuch as both *Watkins* and *Barenblatt* tend to combine both facets, this article will treat the entire problem under the heading of pertinency.

Both the *Chapman* and *McGrain* cases recognized the possible defense of pertinency,[97] but the Supreme Court did not fully discuss the issue until *Sinclair v. United States*.[98] In that case the Court laid down two rules. First, it is incumbent upon the United States, as prosecutor, to plead and show that the question pertains to some matter under investigation.[99]

94. Barenblatt v. United States, 360 U.S. 109, 140 (1959).
95. See note 46 *supra* and accompanying text.
96. 2 U.S.C. § 192 (1958).
97. McGrain v. Daugherty, 273 U.S. 135, 176 (1927); *In re* Chapman, 166 U.S. 661, 669 (1897).
98. 279 U.S. 263 (1929).
99. *Id.* at 296-97. *Accord*, Kenney v. United States, 218 F.2d 843, 845 (D.C. Cir. 1954); United States v. Orman, 207 F.2d 148, 154 (3d Cir. 1953); United States v. Knowles, 148 F. Supp. 832, 935 (D.D.C. 1957); United States v. Kamin, 136 F. Supp. 791, 793 (D. Mass. 1956); United States v. DiCarlo, 102 F. Supp. 597, 601 (N.D. Ohio 1952). Compare Bowers v. United States, 202 F. 2d 447, 453 (D.C. Cir. 1953): "But again we point out that the Sinclair case says the United States must plead and show pertinency. This means, we think, that when a question is not in itself or because of its context plainly pertinent, the United States must somehow show its pertinency to the court . . . ."

Second, the issue of pertinency, like relevancy at the trial of issues in court and materiality of false testimony in a prosecution for perjury, is to be determined by the court as a question of law.[100] To decide this issue the court should determine "whether the facts called for by the question were so related to the subjects covered by the [authorizing] resolutions that such facts reasonably could be said to be 'pertinent to the question under inquiry."[101]

Since *Sinclair* an extensive body of law has been promulgated to deal with the amorphorous concept of pertinency. Although the courts ultimately determine whether the questions propounded are pertinent to the subject matter, it is, nevertheless, incumbent upon the witness to decide correctly for himself the pertinency of the questions.[102] Should the witness make an erroneous decision, even in good faith, and refuse to answer a question which a court later decides is pertinent, he would still be subject to the criminal penalties as provided by statute.[103] Recognizing the harshness of this situation, the courts have attempted to alleviate the burden of the witness.[104]

As mentioned above, the Government has the burden of proving pertinency. The rationale for this, as developed by the later cases, is that the statute makes pertinency an element of the crime of refusing to testify

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100. Sinclair v. United States, 279 U.S. 263, 298-99 (1929). *Accord*, Keeney v. United States, 218 F.2d 843, 845 (D.C. Cir. 1954); Morford v. United States, 176 F.2d 54, 57 (D.C. Cir. 1949), *rev'd on other grounds*, 339 U.S. 358 (1950); United States v. DiCarlo, 102 F. Supp. 597, 601 (N.D. Ohio 1952). United States v. Orman, 207 F.2d 148, 155-56 (3d Cir. 1953), modified this principle so that the issue of pertinency may properly go to the jury where evidence *aliunde* is introduced. For congressional investigating cases involving the issue of perjury, see United States v. Norris, 300 U.S. 564 (1937); United States v. Moran, 194 F.2d 623 (2d Cir.), *cert. denied*, 343 U.S. 965 (1952); Maragon v. United States, 187 F.2d 79 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 932 (1951); Seymour v. United States, 77 F.2d 577 (8th Cir. 1935); United States v. Cross, 170 F. Supp. 303 (D.D.C. 1959); United States v. Icardi, 140 F. Supp. 383 (D.D.C. 1956); United States v. Creech, 21 F. Supp. 439 (D.D.C. 1937).

101. Sinclair v. United States, 279 U.S. 263, 298-99(1929). "When evidence is taken by a committee, the pertinency of questions propounded must be determined by reference to the scope of the authority vested in the committee by the Senate." Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 613 (1929) (dictum).

102. See Watkins v. United States, 354 U.S. 178, 208 (1957); Sinclair v. United States, 279 U.S. 263, 299 (1929); United States v. Orman, 207 F.2d 148, 154 (3d Cir. 1953).

103. "To compound the problems of the witness, he must make a split-second gamble as to pertinency. If he answers a question which he honestly thinks is not pertinent, he is allowing the committee to inquire into areas of his private life which may be unjustified by the resolution authorizing the investigation. If he refuses to answer, even though in good faith, the committee may later cite him for contempt. He would then find himself subjected to penalties for his original refusal even though he may now be willing to answer after a court ruling as to pertinency." Lovell, *Scope of the Legislative Investigational Power and Redress for its Abuse*, 8 HASTINGS L. J. 276, 281 (1957).

104. "[W]hen Congress seeks to enforce the investigating authority through the criminal process administered by the federal judiciary, the safeguards of criminal justice become operative." Sacher v. United States, 356 U.S. 576, 577 (1958). See also Annot., 99 L. Ed. 985 (1955).

before a congressional committee.[105] In order for the Government to sustain the burden it must show that: 1) the material sought or answers requested relate to a legislative purpose which Congress can constitutionally entertain; and 2) such material or answers fall within the grant of authority actually made by Congress to the investigating committee.[106] "Presumption or possibility of pertinency will not suffice."[107] Consequently, an investigating committee may not, by excessively broad questions, engage in a general "fishing expedition . . . for the chance something discreditable might turn up."[108] Pertinency, as indicated by the statute means pertinency to the subject matter rather than to the person under interrogation,[109] but pertinency is tested by the possible answer rather than the answer that would have been evoked in any particular case.[110] Therefore, a true and innocent answer will not destroy pertinency.[111]

Aside from delineating what the prosecution must prove, the courts have granted the witness certain rights in regard to the pertinency requirement. Inasmuch as pertinency is an element of the criminal offense, the objection to pertinency, unlike the personal privilege of self-incrimination, is not waived when the witness fails seasonably to assert the objection.[112] Should the witness assert an objection, he is at the time of the interrogation entitled to a clear-cut ruling by the committee on his objection.[113] It is thus apparent that the chairman of the committee or a member thereof has a duty to make known to the witness the relation of the questions to the topic under inquiry. In this respect the position of the witness and the interrogator are the reverse of a self-incrimination plea where the witness may be bound to divulge why an answer would be incriminating.[114]

Although the witness has been provided with various procedural safeguards, the courts tend to tip the scales in the opposite direction by

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105. United States v. Orman, 207 F.2d 148, 154 (3d Cir. 1953); Bowers v. United States, 202 F.2d 447, 452 (D.C. Cir. 1953); DiCarlo v. United States, 102 F. Supp. 597, 601 (N.D. Ohio 1952).

106. United States v. Orman, 207 F.2d 148, 153 (3d Cir. 1953).

107. Bowers v. United States, 202 F.2d 447, 448 (D.C. Cir. 1953).

108. United States v. Kamin, 135 F. Supp. 382, 389 (D. Mass. 1955). "[A] congressional committee [does not possess] the power to examine citizens indiscriminately in the mere hope of stumbling upon valuable information and to cite them for contempt if they refuse to answer . . . ." United States v. Orman, 207 F.2d 148, 154-55 (3d Cir. 1953).

109. Rumely v. United States, 197 F.2d 166, 177 (D.C. Cir. 1952), *aff'd*, 345 U.S. 41 (1953). *Accord*, United States v. Orman, 207 F.2d 148, 153 (3d Cir. 1953).

110. United States v. Orman, 207 F.2d 148, 154 (3d Cir. 1953); United States v. Kamin, 135 F. Supp. 382, 388 (D. Mass. 1955).

111. United States v. Orman, 207 F.2d 148, 154 (3d Cir. 1953).

112. *Ibid.*; Bowers v. United States, 202 F.2d 447, 452 (D.C. Cir. 1953). *But see* United States v. Kamin, 136 F. Supp. 791, 799-800 (D. Mass. 1956): "[B]ut a question need not be the ultimate in pertinency. If it is principally pertinent it need not exclude every possible irrelvancy, at least *unless there is objection by the witness* . . . ." (Emphasis added).

113. Bart v. United States, 349 U.S. 219, 21 (1955); Quinn v. United States, 349 U.S. 155, 165-66 (1955).

114. See note 4 *supra* and accompanying text.

giving wide scope to the questions that may be asked of the witness. This latitude was early illustrated by Circuit Judge Miller's comparison of a court proceeding with a legislative investigation:

> A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress . . . A judicial inquiry relates to a *case*, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates *all possible cases* which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry, which generally is very broad. . . .[115]

In the sphere of subversive activities the pertinency claim has been ardently pursued by recalcitrant witnesses. However, *Lawson v. United States*,[116] decided in 1949, expressly held that the Un-American Activities Committee had the power to inquire whether the witness was a member of the Communist Party or a believer in Communism. Apparently this question is pertinent regardless of what topic the Un-American Activities Committee, or the Internal Security Subcommittee is investigating. The scope of the possible topics under inquiry also appears to expand the range of pertinent questions. In the interest of national security the courts have sanctioned investigations of communist infiltration into such areas as motion pictures,[117] education,[118] labor,[119] and news dispensing.[120]

The claim of pertinency was pursued by Watkins and apparently by Barenblatt. Inasmuch as *Barenblatt v. United States* limited the holding of *Watkins v. United States* to the issue of pertinency, it is probably safe to assume that *Watkins* is still good law as to that issue.

In *Watkins*, Mr. Chief Justice Warren recognized two interrelated types of pertinency — jurisdictional pertinency and statutory pertinency. Although the line of demarcation is far from clear, the former appears to be in the nature of a due process requirement in that it restricts the committee to "the missions delegated to them," while the latter, derived from the statute making refusal to testify a misdemeanor, requires that the witness be informed of the precise subject matter of the inquiry and the relation thereto of the questions.

Beginning his attack under statutory pertinency, the Chief Justice demanded that the witness be informed as to the subject under inquiry.

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115. Townsend v. United States, 95 F.2d 352, 361 (D.C. Cir. 1938).
116. 176 F.2d 49 (D.C. Cir. 1949), *cert denied*, 339 U.S. 934 (1950).
117. *Ibid.*
118. United States v. Knowles, 148 F. Supp. 832, 836-37 (D.D.C. 1957); United States v. Deutch, 147 F. Supp. 89, 91-92 (D.D.C. 1956).
119. *Ibid.* See also House Comm. on Un-American Activities, *Investigations of Un-American Activities and Propaganda*, H. R. Rep. No. 2742, 79th Cong., 2d Sess. iv (1947): "In the opinion of the committee, the most serious penetration has been within the labor unit . . . ."
120. United States v. Shelton, 148 F. Supp. 926, 934 (D.D.C. 1957).

He then discussed the full gamut of sources whereby the information could be obtained. The first source was the authorizing resolution, but the resolution of the Un-American Activities Committee was much too broad to be informative. The opening statement of the chairman, who paraphrased the authorizing resolution and gave a general sketch of the past efforts of the Un-American Activities Committee, added nothing toward the discovery of the subject under inquiry. Although the full Committee adopted a formal resolution which authorized the creation of the Subcommittee before which Watkins appeared, the resolution shed no light on the problem.

The Chief Justice then examined the proceedings in order to tackle the Government's contention that the topic of inquiry concerned communist infiltration into labor. The contention was rebutted by the fact that six of the nine witnesses questioned had no connection with labor and seven of the thirty persons about whom Watkins was interrogated were also unconnected with organized labor.[121] Finally, the "question under inquiry" could have been disclosed when Watkins specifically made the pertinency objection. The reply of the chairman that the Committee had been established to investigate "subversion and subversive propaganda" was unsatisfactory to the Court.[122] In view of the dearth of guidance as to both the subject under inquiry and the pertinency of the questions, the conviction of Watkins for his refusal to testify was held to be invalid under the due process clause of the Fifth Amendment.[123]

Mr. Justice Frankfurter, concurring in the *Watkins* decision, concluded with the following words:

> [T]he actual scope of the inquiry the Committee was authorized to conduct and the relevance of the questions to that inquiry must be shown to have been luminous at the time when asked and not left, at best, in cloudiness. The circumstances of this case were wanting in these essentials.[124]

As far as the holding on the pertinency claim in *Barenblatt v. United States*, the principles enunciated in *Watkins* remain intact. Mr. Justice Harlan found that, unlike Watkins, Barenblatt failed to object on the

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121. Mr. Justice Clark, dissenting, apparently was of the opinion that since only a quarter of the persons about whom the witness was questioned were not labor people, the proper inference was that the subject under inquiry *was* Communism in organized labor. Watkins v. United States, 354 U.S. 178, 227 (1957).

122. "Subversive and un-American propaganda," as used in the authorizing resolution of the Un-American Activities Committee, appears to have satisfactorily identified the subject under inquiry in Barsky v. United States, 167 F.2d 241, 248 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948).

123. As a result of this holding the pertinency issue was decided in favor of the witness in Sacher v. United States, 356 U.S. 576 (1958) and in United States v. Peck, 154 F. Supp. 603 (D.D.C. 1957).

124. Watkins v. United States, 354 U.S. 178, 217 (1957).

score of pertinency.[125] However, the Justice did not let the issue rest at this point. He went on to find that pertinency was made to appear with "undisputed clarity."

To support the above finding, Mr. Justice Harlan pointed to the following items: 1) The witness's prepared memorandum of constitutional objections showed that he was aware of the Subcommittee's authority and purpose in questioning him.[126] 2) "The subject matter of the inquiry had been identified at the commencement of the investigation as Communist infiltration into the field of education."[127] 3) On the day Barenblatt appeared the scope of the hearings was announced as "in the main communism in education and the experience and background in the party by Francis X. T. Crowley [dealing] with activities in Michigan, Boston, and in some small degree, New York."[128] 4) Barenblatt heard Crowley testify that Barenblatt was a former member of an alleged communist student organization at the University of Michigan.[129] 5) Barenblatt said nothing when the chairman informed the witness why he had been called.[130] 6) "Unlike Watkins . . . petitioner refused to answer questions as to his own Communist Party affiliations whose pertinency of course was clear beyond doubt."[131]

Exactly why Mr. Justice Harlan elaborated on the non-existent pertinency objection is open to speculation. Had the Justice pointed to the fact that pertinency was a necessary element in the Government's case from which petitioner sought review and that the objection could not be waived, there would have been ample justification for the extended discussion. However, the Court was more concerned with whether the witness was "adequately apprised' of the pertinency of the questions, than with whether the prosecution had sustained its burden of proof. It thus appears that the majority's treatment of the pertinency issue, after deciding that the witness did not raise the objection, was essentially another attempt to limit the application of *Watkins*. It is interesting to note that the four dissenters in *Barenblatt* did not discuss the issue of pertinency.

D. *The Evasive First Amendment*

The third and final issue discussed in *Barenblatt v. United States* was whether the questions petitioner refused to answer infringed upon rights protected by the First Amendment.

125. Barenblatt had brought with him a memorandum containing statements which indicated that he might wish to raise the pertinency objection. However, the objection which the witness actually made contained a general challenge to the power of the Subcommittee. See note 51 *supra*. Compare United States v. Peck, 154 F. Supp. 603, 611 (D.D.C. 1957).

126. There is doubt in the writer's mind whether this conclusion follows from Barenblatt's memorandum. See note 51 *supra*.

127. Barenblatt v. United States, 360 U.S. 109, 124 (1959).

128. *Id.* at 124-25.

129. Crowley immediately preceded Barenblatt on the witness stand.

130. The chairman had stated that Barenblatt had information about communist activities in the United States which would be valuable to the Subcommittee.

131. Barenblatt v. United States, 360 U.S. 109, 125 (1959).

The First Amendment is undoubtedly the most nebulous defense available to the witness. The courts have talked much about the issue but have decided little. In many cases the dissents and the concurrences in a Holmes-like manner have been more significant than the majority opinions.[132] One student appropriately labeled judicial reaction to the problem as "confusion and avoidance."[133] The possibilities inherent in the First Amendment range from non-application to a complete bar to the compulsion of any testimony before a congressional committee. Indeed, the cases have indicated that the entire problem is a matter of degree to be decided in each instance.

When a witness pleads the First Amendment he may have several things in mind. The First Amendment appears to have been used along with the self-incrimination clause of the Fifth Amendment in order to neutralize the stigma attached to the plea of self-incrimination.[134] When pleaded alone the First Amendment, besides the obvious elements of speech, press, assembly and religion, appears to include the concepts of freedom of privacy, freedom from exposure and freedom to remain silent. It is essentially these latter ideas which have been examined and developed by the various justices confronted with the plea of the First Amendment in a congressional investigation.

Although not recognized as such, the defense of First Amendment freedoms in congressional investigations probably had its genesis in *Kilbourn v. Thompson*.[135] In that case it was stated that Congress did not have the power to inquire into the "private affairs of citizens." The right to privacy as a limitation on congressional investigatory power was also recognized in *In re Chapman*,[136] *McGrain v. Daugherty*,[137] and *Sinclair v. United States*.[138]

In the late 1940's the First Amendment as a defense was specifically discussed by the Second and District of Columbia Circuits. The Second Circuit in *United States v. Josephson*,[139] cast doubt upon the private affairs doctrine of the *Kilbourn* case. However, the court, determined that

132. *Id.* at 134; United States v. Rumely, 345 U.S. 41, 53 (1953); Barsky v. United States, 167 F.2d 241, 252 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948); United States v. Josephson, 165 F.2d 82, 93 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948).

133. Comment, 65 YALE L. J. 1159, 1163 (1956).

134. Emspak v. United States, 349 U.S. 190 (1955) (Refusal to answer based on "primarily the first amendment, supplemented by the fifth"); Quinn v. United States, 349 U.S. 155 (1955) (Refusal to answer based on "the first and fifth amendments," as well as "the first amendment to the Constitution, supplemented by the fifth amendment"); United States v. Kamin, 136 F. Supp. 791 (D. Mass. 1956) (Refusal to answer based partially on the First Amendment, enlarged at the trial to include the Fourth, Fifth and Ninth Amendments); United States v. Fitzpatrick, 96 F. Supp. 491 (D.D.C. 1951) (Refusal to answer based on "the First Amendment to the Constitution, supplemented by the Fifth Amendment").

135. 103 U.S. 168 (1881).

136. 166 U.S. 661, 668-69 (1897).

137. 273 U.S. 135, 173-74 (1926).

138. 279 U.S. 263, 291-95 (1929).

139. 165 F.2d 82 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948).

un-American propaganda was a matter which affected the very survival of the United States Government and, consequently, was not the purely personal concern of any one. The court also discounted the exposure argument. In considering the First Amendment the court noted: "The theory seems to be that the investigation of un-American or subversive propaganda impairs in some way not entirely clear the freedom of expression guaranteed by the Bill of Rights."[140] The majority found nothing inconsistent between Congress's particular use of its fact finding power and the protection offered by the First Amendment. On the other hand, Circuit Judge Clark, in his dissent, believed that the right to speak and express one's opinions was directly and obviously abridged. The Judge took cognizance of the announced desire of the un-American Activities Committee that the persons it found guilty should forfeit their jobs in public and private industry, be subject to prosecution for any collateral crimes which may have been revealed and be exposed to public condemnation in general.

Approximately three months later the District of Columbia Circuit in *Barsky v. United States*[141] paralleled the *Josephson* approach. Refuting the contention that the "clear and present danger" doctrine[142] should determine whether the First Amendment had been violated, Judge Prettyman, speaking for the majority, claimed: "There is a vast difference between the necessities for inquiry and the necessities for action. The latter may be only when the danger is clear and present, but the former is when danger is reasonably represented as potential."[143] Assuming that even the timid and those sensitive to the stigma of unpopularity cannot be unconstitutionally restrained in freedom of thought, the Judge apparently decided that the public necessity in being informed of subversive activities outweighed the private rights in free expression. The majority was opposed, by a vigorous dissent from Judge Edgerton. The dissenting Judge analogized the implied investigating power to the explicitly granted taxing power, which had previously been held to be subject to the limitations of the First Amendment.[144] The dissent claimed that the investigation had restricted free speech by uncovering and stigmatizing expressions of unpopular views and by forcing people to express their views. "Freedom of

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140. *Id.* at 90.

141. 167 F.2d 241 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948).

142. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Holmes, J., in Schenck v. United States, 249 U.S. 47, 52 (1919).

143. Barsky v. United States, 167 F.2d 241, 247 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948).

144. The dissent cited cases where municipal license taxes which were applied to the dissemination of religious literature were declared invalid as a denial of freedom of speech, press and religion. Murdock v. Pennsylvania (City of Jeannette), 319 U.S. 105 (1943); Jones v. Opelika, 319 U.S. 103 (1943); Busey v. District of Columbia, 138 F.2d 592 (D.C. Cir. 1943).

speech is freedom in respect to speech and includes freedom not to speak."[145] Judge Edgerton was severely critical of the idea of Congress punishing by exposure and obloquy. Rather than balance public interest against private interest, the dissent would require a "clear and present danger" before a person could be compelled to disclose his personal beliefs. In concluding his free speech arguments, Judge Edgerton stated: "No one denies that the inquest is an effective instrument of restraint. I hope the last word has not been said on the question whether it is a legal one."[146]

In 1949, the Court of Appeals for the District of Columbia upheld various investigations conducted by the Un-American Activities Committee.[147] *Lawson v. United States*,[148] the most notable of the 1949 cases, followed the *Barsky* decision and rejected the witness's contentions involving the right of privacy and the freedom to remain silent as to beliefs and associations.

In regard to the status of the First Amendment by 1951, as a limitation on congressional investigations of subversive activities, a District Court Judge reported:

> Now, whatever may have been thought to have been the effect of the First Amendment upon the right of a congressional committee to make inquiries relating to the activities, affiliations, and associations of a witness, in the light of the Josephson case, in the Second Circuit, and the Barsky case, in our own [District of Columbia] Circuit, there can be no possible question in these two jurisdictions, if indeed there can be in any other, that the First Amendment does not preclude the Committee from asking the questions here involved, nor does it justify the defendant in refusing to answer them. (Footnotes omitted.)[149]

In 1953, the United States Supreme Court decided to give full hearing to a congressional investigating case specifically involving the First Amendment plea. In *United States v. Rumely*,[150] the defendant was convicted of refusing to answer questions propounded to him by the House Committee on Lobbying Activities. The witness was the secretary of an organization engaged in the sale of books of "a particular political tendentiousness." The questions involved disclosure of names of persons who made bulk purchases of these books for further distribution. The court of appeals

145. Barsky v. United States, 167 F.2d 241, 254 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948).

146. *Id.* at 260.

147. Marshall v. United States, 176 F.2d 473 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 933 (1950); Morford v. United States, 176 F.2d 54 (D.C. Cir. 1949), *rev'd*, 339 U.S. 258 (1950); Lawson v. United States, 176 F.2d 49 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 934 (1950). The *Morford* case made no reference to the First Amendment.

148. 176 F.2d 241 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 934 (1950).

149. United States v. Fitzpatrick, 96 F. Supp. 491, 493 (D.D.C. 1951). It is difficult to ascertain exactly what "the questions here involved" were. The court merely stated that they were pertinent to the inquiry.

150. 345 U.S. 41 (1953).

reversed the conviction, basing its decision in part on the violation of the First Amendment.[151] The Supreme Court affirmed this decision, but avoided deciding the constitutional question by holding that the phrase "lobbying activities," as used in the authorizing resolution, did not apply to the activities of defendant; hence, the committee was without statutory power to extract the particular information. Mr. Justice Douglas, concurring, believed that the resolution *did* apply to defendant's activities, but that the inquiry, by subjecting the press to harassment, abridged the First Amendment.

In the interim between *Rumely* and *Watkins*, the First Amendment as a defense to prosecution for refusal to testify traveled a rather rocky road.[152] One court actually found a justifiable abridgement of defendant's right to freedom of speech.[153] Another court rejected the First Amendment, because the "requisite pertinency of specific questions existed."[154] On the other hand, the Federal Court of Appeals for the Third Circuit stated: "Where a congressional investigation enters a field to which the First Amendment is applicable, courts will be particularly careful to check unlawful lines of inquiry."[155] However, in its next breath the court "remembered" that the right of free speech was not absolute, but yielded to national interests of larger importance.

About the only favorable response to a First Amendment plea was an incidental statement of the Supreme Court that the "power to investigate cannot be used to inquire into private affairs unrelated to a valid legislative purpose."[156] Even this pronouncement turned into a double-edged sword as one lower federal court paraphrased the meaning so there could be inquiry into private affairs where a valid legislative purpose did exist.[157]

In *Watkins v. United States* the Supreme Court extensively discussed the implications of the First Amendment,[158] but its consideration of the

151. Rumely v. United States, 197 F.2d 166 (D.C. Cir. 1952). It is interesting to note that this opinion was written by Judge Prettyman, who rejected the First Amendment arguments in the *Barsky* case. In *Rumely*, he recognized that there was an impingement upon free speech in both cases, but he distinguished the cases on the ground that the factor of public danger, such as the tenets of communism and the nature of the Communist Party, was absent in *Rumely*.

152. See Barenblatt v. United States, 240 F.2d 875 (D.C. Cir. 1957); Sacher v. United States, 240 F.2d 46 (D.C. Cir. 1957); United States v. Lattimore, 215 F.2d 847 (D.C. Cir. 1954); United States v. Orman, 207 F.2d 148 (3d Cir. 1953); United States v. Knowles, 148 F. Supp. 832 (D.D.C. 1957); United States v. O'Connor, 135 F. Supp. 590 (D.D.C. 1955). The *Barenblatt* and *Sacher* cases were reviewed by the Supreme Court, remanded and reviewed a second time. For the final dispositions, see Barenblatt v. United States, 360 U.S. 109 (1959); Sacher v. United States, 356 U.S. 576 (1958). For a commentary on congressional investigations in this period, see Massey, *Congressional Investigations and Individual Liberties*, 25 U. CIN. L. REV. 323 (1956).

153. United States v. O'Connor, 135 F. Supp. 590, 596 (D.D.C. 1955).

154. United States v. Knowles, 148 F. Supp. 832, 836 (D.D.C. 1955).

155. United States v. Orman, 207 F. 2d 148, 158 (3d Cir. 1953).

156. Quinn v. United States, 249 U.S. 155, 161 (1955).

157. Barenblatt v. United States, 240 F.2d 875, 883 (D.C. Cir. 1957). For the subsequent history of this case, see Barenblatt v. United States, 360 U.S. 109 (1959).

158. See note 42 *supra* and accompanying text.

problem appears to have had little or no bearing on the outcome of the case. Mr. Chief Justice Warren subjected congressional investigations to the First Amendment and contended that Congress could not expose for the sake of exposure, but he recognized that not all inquiries into private matters were barred. Despite the liberal spirit of the opinion, the Chief Justice detracted from his own reasoning by perpetuating the balancing of the interests test.[159] Mr. Justice Clark, dissenting, refused to find that a general privilege of silence existed under the First Amendment or that the private affairs of the witness had been invaded.

Almost immediately after the *Watkins* decision, a federal district court in *United States v. Peck*[160] decided a congressional investigating case squarely on the basis of the First Amendment. This case appears to be the only decision in which the witness successfully defended by the use of the First Amendment.[161]

In the *Peck* case the Internal Security Subcommittee had interrogated a newspaper man employed by the *New York Times*. The witness refused to answer questions which would have required him to identify others as Communists. The court discussed freedom of press, but did not decide the case on that point. Rather, the court believed that there was no national interest which would clearly justify an invasion of the individual's protected freedoms of privacy, thought, and association. Even if there were a sufficient national interest, the witness's First Amendment rights were unconstitutionally infringed because of procedural defects in the investigation. The court then discussed the vagueness of the authorizing resolution and consequently granted defendant's motion for judgment of acquittal. Whatever potency this decision may have had, it was destined to dissipate in the onrush of *Barenblatt*.

The majority in *Barenblatt v. United States*, true to its form on the issues of vagueness and pertinency, diligently worked at restricting the application of the First Amendment. Mr. Justice Harlan admitted that the First Amendment in some circumstances protects the witness from being compelled to testify, but, unlike the plea of self-incrimination, the First Amendment would not provide a right to resist inquiry in all circumstances. Taking advantage of an injudicious statement by the Chief Justice in *Watkins*, the majority held: "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and

159. "The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness." Watkins v. United States, 354 U.S. 178, 189 (1956).

160. 154 F. Supp. 603 (D.D.C. 1957).

161. As mentioned previously, Rumely v. United States, 197 F.2d 166 (D.C. Cir. 1952), presented a successful application of the First Amendment as a defense, but on review, the Supreme Court decided the case solely as one of statutory construction. United States v. Rumely, 345 U.S. 41 (1953).

public interests at stake in the particular circumstances shown."[162] In applying the test the Court reaffirmed that a proper legislative purpose existed in the investigation of communist activity and pointed to the fact that the Communist Party has not been viewed as an ordinary political party.[163] In reply to a contention involving academic freedom, the majority claimed that the investigation was directed at the advocacy of, or preparation for, overthrow of the Government by force, rather than at controlling what was being taught at universities. "The strict requirements of a prosecution under the Smith Act . . . are not the measure of the permissible scope of a congressional investigation into 'overthrow', for of necessity the investigatory process must proceed step by step."[164] Since the inquiry was found to be in aid of legislative process, the Court would not inquire into the motives of the Committee members. This resulted in the Court's discounting of the exposure argument. The majority further contended that the subcommittee was not attempting to pillory Barenblatt and that it had probable cause for the belief that the witness possessed valuable information. In view of the foregoing, the Court struck the balance in favor of the Government over the individual.

The dissent in *Barenblatt* was greatly disturbed over the manner in which the Court treated the First Amendment freedoms and the matter of exposure. Highly critical of the use the majority made of the balancing of the interests doctrine, Mr. Justice Black maintained that the test should be employed where the law primarily regulates conduct or action and only indirectly affects speech, but not where the law directly abridges the First Amendment freedoms. The Justice believed that the Court's use of the balancing of the interest test "is closely akin to the notion that neither the First Amendment nor any other provision of the Bill of Rights should be enforced unless the Court believes it is *reasonable* to do so."[165] Even assuming that some balancing is proper, the dissent would strike the balance in favor of Barenblatt's silence. In the eyes of the minority, Barenblatt's interest is to be able to join organizations, advocate causes, and make political "mistakes." However, the dissenters believed that the obloquy which results from such investigations as the one in question prevents all but the most courageous from expressing views which might in time become disfavored. As to the Government's interest in self-preservation, Mr. Justice Black contended:

> The First Amendment means to me . . . that the only constitutional way our Government can preserve itself is to leave the people the fullest possible freedom to praise, criticize or discuss, as they see fit, all governmental policies and to suggest, if they

162. Barenblatt v. United States, 360 U.S. 109, 126 (1959).
163. The Court cited Galvan v. Press, 347 U.S. 522 (1954); Carlson v. Landon, 342 U.S. 524 (1952).
164. Barenblatt v. United States, 360 U.S. 109, 130 (1959).
165. *Id.* at 143.

> desire, that even its most fundamental postulates are bad and should be changed: "Therein lies the security of the Republic, the very foundation of constitutional government." (Footnote omitted.)[166]

The dissent also rejected the majority's argument which, by refusing to recognize the Communist Party as an ordinary political party, in effect declared that Party outlawed.

> The fact is that once we allow any group which has some political aims or ideas to be driven from the ballot and from the battle for men's minds because some of its members are bad and some of its tenets are illegal, no group is safe. . . . Today's holding, in my judgment, marks another major step in the progressively increasing retreat from the safeguards of the First Amendment.[167]

Mr. Justice Black's final arguments went to the element of exposure. He contended that by the use of the devices of humiliation and public shame to punish witnesses, the Un-American Activities Committee was undertaking a judicial function on a scale greater than that condemned in the *Kilbourn* case. The minority noted that the Committee was punishing by exposure many phases of "un-American" activities which the Committee itself reported could not be reached by legislation, by administrative action, or by any other agency of the Government, including the courts. The dissent also indicated that the Committee violated the bill of attainder provision of the United States Constitution. In summary Mr. Justice Black opined:

> Ultimately all the questions in this case boil down to one — whether we as a people will try fearfully and futilely to preserve Democracy by adopting totalitarian methods, or whether in accordance with our traditions and our Constitution we will have the confidence and courage to be free.[168]

IV. Conclusion

In view of *Watkins*, how does one account for *Barenblatt*? If one ruthlessly disregards as *obiter dicta* the First Amendment and vagueness arguments by Mr. Chief Justice Warren in *Watkins* and restricts the holding in that case to the issue of pertinency, then technically the case can be reconciled with *Barenblatt*. But, certainly the approach and spirit of the two decisions are inconsistent. It is perhaps unfortunate that the facts were sufficiently different in the two cases so that the situation of Mr. Watkins could generate much more sympathy than that of Mr. Barenblatt. Putting the constitutional and legal arguments aside, the facts in themselves

166. *Id.* at 145-46.
167. *Id.* at 150, 151-52.
168. *Id.* at 168.

might justify the result reached in each case.[169] One might also look at the composition of the Court and the positions of its members in the two cases in attempting to rationalize the results. The majority in *Watkins* consisted of Mr. Chief Justice Warren and Justices Black, Douglas, Harlan and Brennan. Of these all but Mr. Justice Harlan dissented in *Barenblatt*. Mr. Justice Frankfurter, who concurred in *Watkins* on grounds limited to the pertinency issue, and Mr. Justice Clark, who dissented in *Watkins*, were in the majority in *Barenblatt*. Justices Burton and Whittaker took no part in the consideration or decision of *Watkins*. Justices Whittaker and Stewart, the latter having replaced Mr. Justice Burton, were also in the majority in *Barenblatt*. Hence, with the sole exception of Mr. Justice Harlan, who wrote the majority opinion in *Barenblatt*, the positions of the several justices in the two cases cannot be said to be inconsistent. One can only speculate as to what induced Mr. Justice Harlan to agree with the majority in *Watkins* and then desert his colleagues in *Barenblatt*. If this could be determined, the enigma of *Watkins* vis-à-vis *Barenblatt* would be solved.

Although the puzzle of reconciling *Watkins* and *Barenblatt* may never be satisfactorily pieced together, we can, nevertheless, try to resolve the problem posed at the beginning of this article, *i.e.* assuming the plea of self-incrimination has serious disadvantages, what legal and constitutional defenses are available to a witness who must face a congressional investigating committee.

As far as the investigation of un-American activities is concerned, vagueness no longer appears to be a vice. Undoubtedly, both the Un-American Activities Committee and the Internal Security Subcommittee are functioning pursuant to a valid exercise of legislative power and under sufficiently definite authorizing resolutions. As to future congressional investigations into other areas, it would seem wise for a witness to challenge the authorizing resolutions before they have had an opportunity to obtain a "legislative gloss" which may cure any initial defects.

An objection to pertinency, seasonably made, apparently is the witness's strongest weapon, for he can compel his interrogators to divulge the subject matter of the investigation and how the questions relate thereto. Such an objection, of course, will not suffice where the Un-American Activities Committee or the Internal Security Subcommittee asks a witness if he himself is or has been a Communist, but beyond this the objection is applicable. If the objection is not seasonably made, the Government still must prove pertinency as an element of the criminal offense, but this appears to be easily achieved by showing the surrounding circumstances of the investigation.

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169. See text on p. 387 and pp. 390-91 *supra*.

The defense of the First Amendment has been in a state of flux, but the cycle seems to have been completed so that the courts are, in effect, back to the days of *Josephson* and *Barsky*. It is interesting to note that both sides have made concessions. The "conservatives" agree that the First Amendment may be a bar in some instances, while the "liberals" maintain that the First Amendment does not bar all investigations. Some sort of no-man's land appears to have been created. The clue to solving this dilemma, at least as far as the majority is concerned, is the balancing of the interests test. By the Court's use of this test, the First Amendment offers little relief in the investigation of un-American activities, but inasmuch as the Court places communism in a special category, it seems safe to presume that the First Amendment as a defense has vitality in other fields of investigation.

There seems to be no doubt but that the congressional investigation serves a necessary and useful function. However, the power of Congress is susceptible to causing irreparable damage to individuals who must appear before the committee of inquiry. Since the line of demarcation between the fact finding function and the quasi-judicial exercise of power is very tenuous, it seems inevitable that to a certain extent the witness is always on trial. Consequently, he should be entitled to certain procedural and substantive safeguards.

It has been suggested that Congress promulgate a set of rules of investigating procedure, possibly similar to the Federal Rules of Civil and Criminal Procedure or analogous to the Administrative Procedure Act.[170] In addition, the Supreme Court could re-evaluate and consolidate its position on the defenses of vagueness, pertinency, and the First Amendment as they pertain to the investigatory power. The high tribunal could establish its position in a case not beclouded by the communist issue, lest the Court's philosophy on subversive activities serve as precedent for congressional investigations in general.

170. "[T]he need for Congress to prescribe a general code of fair procedures for its investigating committees remains great . . . ." CARR, THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 462 (1952). A summary of various proposals appears in Galloway, *Proposed Reforms*, 18 U. CHI. L. REV. 478 (1951). See especially Mr. Galloway's appendix of proposed safeguards. Galloway, *supra* at 496-98.